

Where Are We?

Anti-Gay-Lesbian-Bisexual Ballot Attacks Today

RHONDA R. RIVERA*

I am proud to have been asked to introduce this important Symposium on the constitutionality of anti-gay initiatives. The questions addressed in this Symposium are important ones for American constitutional law. However, before commenting on the initiatives themselves, I shall attempt to place the initiatives and the battles to overcome them in context, both historical and academic. First, the fight over these initiatives is part of the greater societal battle over the civil rights of gay and lesbian citizens. Second, the discussion of the constitutionality of these initiatives implicates aspects of sexual orientation law, an academic legal area that has arisen from the battles waged by gay men and lesbians for their civil rights.

This Symposium occurs in the year that marks the twenty-fifth anniversary of the Stonewall Riot: the event that sparked the beginning of the modern gay and lesbian civil rights movement. However, even while noting this important event, we must not forget those events and those persons who preceded Stonewall by many years. As Jonathan Katz has documented, gay and lesbian history, although not necessarily labeled as such, has existed since, and no doubt preceded, written history.¹ Any of us who has had *Leviticus* cited knows somebody was doing "it" in early Israel.² Anyone who has looked at those interesting pictures from Eastern history is aware that no sexual positions are new and that same-gendered folks were featured. As Kinsey said, anything two humans can do without mechanical means is natural.³ Thus, gay and lesbian existence, even for those who would label us solely erotic beings, certainly is contemporaneous with the existence of any humans whose erotic interest is in the other sex. However, like our heterosexual counterparts, such erotic interests are not the core of our being nor of our culture.

Even in modern Western culture and in the United States, fighters for the equal treatment of gay and lesbian folks long preceded Stonewall.⁴ In Germany, Great Britain, and the United States homophile movements existed in the late 1800s and early 1900s.⁵ Then, after World War II, the Matachine

* Professor of Law, The Ohio State University College of Law; B.A., Douglas University, 1959; M.P.A., Syracuse University, 1960; J.D., Wayne State University, 1967.

¹ JONATHAN KATZ, *GAY AMERICAN HISTORY* 1-8 (1976).

² *Leviticus* 18:22, 20:13.

³ See ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 202 (1948).

⁴ See generally JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* (1983).

⁵ Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L.

Society, Daughters of Bilitis, and the Society for Individual Rights worked hard in dangerous times for the rights of gay and lesbian persons.⁶ We often forget that our brothers and sisters picketed the White House in the 1950s—the McCarthy era. That action was incredibly brave! The shift that Stonewall marked from those prior movements was two-fold: a change from assimilation as the main strategy (we are just like you are!) and a shift of class (from the private apartments of the middle class to the bars).

Bars were, for many years, a mainstay of the gay and lesbian culture, regardless of social class, and were the one place you could go to meet other gay men and lesbians and feel some modicum of safety.⁷ Today, the places of socializing have expanded dramatically, although the bars are still important. This bar culture phenomena has left the community with mixed feelings. We honor the bars as safe havens and as the birthplace of our civil rights movement; however, the price has been high. This availability and social approval of alcohol coupled with a need to deaden the oppressive experience of the closet has left us with an intolerably high incidence of alcoholism in our community.⁸

The Stonewall Riot began in such a bar. The customers of the Stonewall were not protesting employment discrimination, housing discrimination, or public accommodation discrimination—the holy trinity of civil rights—but rather the daily, continuous physical harassment and degradation practiced by the New York City Police Department. Today, we do not appreciate that not long ago, state liquor commissions forbade the service of gay and lesbian persons; bars that catered to gay patrons were considered to be per se “disorderly.”⁹ Gay bars were regularly raided, and patrons arrested. During such raids, gay people had to quickly pretend to be heterosexually oriented to avoid arrest. At the Stonewall Inn in New York City, police would enter on a regular basis, confident in their power, and harass the patrons verbally and physically, knowing that the patrons could not fight back.

REV. 1551, 1554–58 (1993).

⁶ *Id.* at 1558.

⁷ D’EMILIO, *supra* note 4, at 12–13.

⁸ Ellen F. Ratner, *Treatment Issues for Chemically Dependent Lesbians and Gay Men*, in *PSYCHOLOGICAL PERSPECTIVES ON LESBIAN AND GAY MALE EXPERIENCES* 567, 568 (Linda D. Garnets and Douglas C. Kimmel eds., 1993).

⁹ *E.g.*, *Lynch’s Builders Restaurant v. O’Connell*, 103 N.E.2d 531, 531 (N.Y. 1952) (holding that licensee lost his liquor license for knowingly allowing homosexual activities on the premises, thereby rendering the premises disorderly). This policy continued in New York until 1967. *E.g.*, *Kerma Restaurant Corp. v. State Liquor Auth.*, 233 N.E.2d 883, 835 (N.Y. 1967) (holding that a gathering of homosexuals without a breach of peace does not make premises disorderly).

On June 27 of 1969, the patrons did fight back and the rest is history! The gay patrons included bar dykes and drag queens. They did not fight back for the right to assimilate, to be like everyone else; rather, they fought back because they were visibly "different" and were tired of being treated as less than human. They fought to be themselves.

This Symposium emphasizes an important feature of the modern fight for gay and lesbian rights: the use of the courts to redress wrongs and attain equal rights under the law. Before the Stonewall Riot, gay men and lesbians had been in the courts, but most of those occasions involved defensive positions, often involving charges of sexual conduct.¹⁰ Gay men and lesbians seldom pursued their causes in court knowing that probable loss awaited them not only in the court, but that the concomitant publicity would mean losing their families, their jobs, and their homes.

Prior to the Stonewall Riot, rare legal victories had been achieved. For example, the Supreme Court had upheld the right of a homophile magazine to be distributed through the mails.¹¹ Conversely, the Supreme Court had also upheld the exclusion of gay and lesbian immigrants as "psychopathic personalities."¹² The early sixties had seen the fight of Frank Kameny. Kameny was a federal civil servant who was fired for being gay; he fought his firing, something few persons in similar positions had done. Although he did not "win" his own personal battle, he went on to be a tireless fighter who was instrumental in obtaining due process rights and substantive protections for numerous gay and lesbian federal civil servants.¹³ He continues that service today, acting as a nonlawyer advocate—one of our heroes.

After Stonewall, the number of gay Americans who were willing to fight for their civil rights grew dramatically.¹⁴ School teacher Burton won her case, only to be denied reinstatement.¹⁵ School teacher Acanfora had his free speech rights affirmed, only to have his firing upheld because he "falsified" his teaching application by not listing his membership in a gay organization.¹⁶ (Of

¹⁰ Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613 (1974).

¹¹ *One, Inc. v. Olesen*, 355 U.S. 371 (1958) (per curiam), *aff'd* 241 F.2d 772 (1957).

¹² *Boutilier v. Immigration and Naturalization Serv.*, 387 U.S. 118, 123 (1967).

¹³ *Kameny v. Bricker*, 282 F.2d 823, 824 (D.C. Cir. 1960) (per curiam) (upholding dismissal), *cert. denied*, 365 U.S. 843 (1961); D'EMILIO, *supra* note 4, at 150-57.

¹⁴ Rhonda R. Rivera, Review Essay, 132 U. PA. L. REV. 391, 406-12 (1984) (reviewing JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* (1983)).

¹⁵ *Burton v. Cascade Sch. Dist. Union High Sch. No. 5*, 353 F. Supp. 254, 255 (D. Or. 1973), *aff'd*, 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975).

¹⁶ *Acanfora v. Board of Educ.*, 491 F.2d 498, 504 (4th Cir. 1974), *cert. denied*, 419

course, had he done so, he would have never been hired.) In Washington, Isaacson and Schuster, lesbian mothers, won a long and difficult custody battle.¹⁷ However, hundreds of gay men and lesbian parents lost battles after them. Children were removed from the "influence" of their lesbian mothers because the mothers would turn the children gay. (These same children were sometimes given to the mother of the lesbian mother who, if you believe such a theory, managed to "turn her own daughter gay.")¹⁸ Gay men were forbidden to have their children on overnight visits or to see their children unsupervised because they were presumed, without foundation, to be child molesters.¹⁹ The new and amazing thing about the custody cases was that the parents were fighting for their children despite the overwhelming financial and psychological costs to themselves.

Although federal civil servants gained some rights,²⁰ any gay civil servant who needed a security clearance or who was an employee of any "security" agency, *i.e.*, CIA, FBI, et cetera, was terminated because such persons were deemed security risks.²¹ Since they were "closeted," the government reasoned, gay employees were clear targets for extortion by Soviet spies. Of course, if the employees came out, then they were fired for being gay because gays were security risks. All these claims were made by government advocates with the knowledge that no gay man or lesbian had ever been found to have betrayed his or her country while many of their nongay counterparts had. Recitation of gay law leads only to one conclusion: the *Rivera Principle*—all the opposition need do is come to court, shout "queer," and all bets are off—irrationality reigns, precedents do not hold, and equal treatment disappears from the Constitution.²² As one judge in Missouri said, when faced with overwhelming empirical evidence that gay men were not per se child molesters, "[e]very trial judge . . . knows that molestation of minor boys by adult males is not as uncommon as the psychological experts' testimony indicated."²³

After Stonewall, the growing willingness of gay men and lesbians to go to court to protect themselves and their rights gave rise to two important wings of

U.S. 836 (1974).

¹⁷ See *Schuster v. Schuster*, 585 P.2d 130, 133 (Wash. 1978).

¹⁸ *Chaffin v. Frye*, 119 Cal. Rptr. 22, 26 (Cal. Ct. App. 1975).

¹⁹ See *In re J.S. & C.*, 324 A.2d 90, 94-97 (N.J. Super. Ct. Ch. Div. 1974), *aff'd per curiam*, 362 A.2d 54 (N.J. Super. Ct. App. Div. 1976).

²⁰ See *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969).

²¹ See *McKeand v. Laird*, 490 F.2d 1262, 1263 (9th Cir. 1973); *Adams v. Laird*, 420 F.2d 230, 240 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).

²² No case illustrates this principle more clearly than *Bowers v. Hardwick*, 478 U.S. 186 (1986).

²³ *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865, 869 (Mo. Ct. App. 1982).

the gay rights movement: the litigator lawyers and the academic lawyers. Because of the shortage of legal personnel, the early academics were also litigators, and the early litigators often became academics. These defenders had a synergistic effect that continues today. Early on, modeled on the Legal Defense and Education Fund of the National Association for the Advancement of Colored People (NAACP), the gay movement formed litigation-public interest firms on both coasts, Lambda Legal Defense and Education Fund (LLDEF) and National Gay Rights Advocates. These firms, working on shoestrings, fought numerous battles and won many.

Litigators and professors worked with each other to create a positive body of sexual orientation law. Many of the law professors were also the gay rights leaders in their locale. In addition, each year they inspired law students who then went on to be the next generation of litigators for gay and lesbian rights. All of these folks, working together, not without differences at times, created the heart and soul of the legal arm of the gay and lesbian rights movement.

Prior to the 1970s, one could conclude that no academic discipline such as sexual orientation law existed. A researcher starting in 1975, as I did, would have found that legal indices did not list homosexuality as a separate subject heading nor did they list the topics "lesbian" or "gay." The only heading for gay and lesbian matters was "sodomy" and that heading dealt almost exclusively with criminal charges and their aftermath. In 1974, the *University of Michigan Law Review* published a survey article on the laws criminalizing same-sex sexual conduct,²⁴ but no such survey existed about the civil side of gay and lesbian legal issues. Few law review articles about homosexual legal issues existed. One article, ahead of its time, dealt with the nonexistent employment rights of gay and lesbian persons. The author, Irving Kovarsky, advocated that employment discrimination law should protect gay men and lesbians because such discrimination was irrational and, in addition, was economically inefficient.²⁵ Twenty-three years later, no federal law exists to prohibit employment discrimination against gay men and lesbians.

In 1979, *The Hastings Law Journal* published a law review symposium on the legal situation of gay men and lesbians in the United States.²⁶ At that time, few persons conceived of what is now called "sexual orientation law" as a separate and legitimate area of academic legal concern. Gay men and lesbians were not only hidden in their closets, but the manner in which the American legal system had continuously and systematically discriminated against them was hidden from scrutiny.

²⁴ Note, *supra* note 10.

²⁵ Irving Kovarsky, *Fair Employment for the Homosexual*, 1971 WASH. U. L.Q. 527.

²⁶ *Sexual Preference and Gender Identity: A Symposium*, 30 HASTINGS L.J. 799 (1979).

Many relevant cases were in existence: teachers had been fired for their status as gay persons;²⁷ civil servants had been fired because of their sexual orientation;²⁸ permanent residents had been denied citizenship because of their sexual orientation;²⁹ marriage laws had been challenged by avant-garde gay activists;³⁰ divorce courts had refused to deal honestly with the homosexuality of divorce antagonists;³¹ gay parents had lost custody in the domestic relations courts;³² retired military personnel had been stripped of their retirement rights for sexual conduct years after their active and honorable service;³³ even corporations had been denied incorporation on the basis of the relationship of their purposes to homosexuality.³⁴ These cases were strewn through the case law, uncollected, ignored, and mislabeled. Cases involving gay men and lesbians existed in almost every area of the law, but these cases were not analyzed or treated as a whole. The cases were also difficult to track down because often judges deliberately did not use the word "homosexual" as a descriptor in cases, and the legal researcher had to do extra-legal research to determine exactly what had happened. When analyzed and viewed as a whole, this case law demonstrated, beyond a doubt, pervasive and systemic discrimination against gay men and lesbians in our legal system, *i.e.*, the *Rivera Principle* at work.

My article in *The Hastings Law Journal* attempted to collect every case and instance I could find where gay men and lesbians had been civil litigants. Since that modest beginning, sexual orientation law has become a legitimate (but hardly revered) academic subject and discipline. Today, hundreds of law review articles exist, and more are being written. Every sub-area of gay and lesbian legal existence is being scrutinized, analyzed, and commented upon. Some law schools have classes or seminars that teach sexual orientation law. The first serious texts have appeared.³⁵ Law schools have openly gay and lesbian law teachers and deans. The Association of American Law Schools (AALS) has recognized the Gay and Lesbian Legal Issues Section (GLLIS) and

²⁷ Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 860-74 (1979).

²⁸ *Id.* at 813-29.

²⁹ *Id.* at 934-42.

³⁰ *Id.* at 874-78.

³¹ *Id.* at 878-83.

³² *Id.* at 883-904.

³³ *Id.* at 837-55.

³⁴ *Id.* at 908-13.

³⁵ ARTHUR S. LEONARD, *SEXUALITY AND THE LAW: AN ENCYCLOPEDIA OF MAJOR LEGAL CASES* (1993); *LESBIANS, GAY MEN, & THE LAW* (William B. Rubenstein ed., 1993).

at the annual AALS recruiting conference, the GLLIS had a suite to welcome and advise prospective gay and lesbian law teachers—quite a revolution!

A parallel development has occurred in the litigation lawyers: they have grown in numbers, in legal sophistication, and in national reputation. They have often been the leaders in forming bar associations that support gay and lesbian rights. They undertake complex and difficult litigation with great expertise and knowledge. These talents have never been more evident than in the current attack on the gay and lesbian community by right wing extremists using anti-gay initiatives. This attack requires gay and lesbian advocates to defend, in essence, the very fundamental principles of our Constitution, the right of minority citizens to participate in their government, to have their grievances redressed, and to have their votes have meaning. To quote Suzanne Goldberg, the able advocate from LLDEF, the situation of gay and lesbian citizens today is analogous to early Americans demanding from Great Britain “no taxation without representation.”³⁶ Few nongay Americans see or appreciate the fundamental constitutional battle being fought for all Americans by the gay and lesbian community.

Language often defines the battles and, in some cases, wins them. In the case of gay men and lesbians, the first fight was to control their own “name.” The term “homosexuals” was the label society preferred, a pseudo-medical term that labeled gay men and lesbians as one-dimensional erotic beings who were best described with a medical pathological term. Like “negroes” winning the right to be “blacks” or “African Americans,” the gay population has had to fight to control its own definition. More recently, some activists have taken back the epithet and are proudly “queer” (as the proverbial three dollar bill!). Sexual “orientation” law as opposed to sexual “preference” law was another milestone. I, for one, do not want my identity trivialized as a “preference.” Orientation has more integrity as a label.

This discussion of semantics brings us to a major battle: are gay men and lesbians “born” or “created after birth”? Have gay men and lesbians, as such, always existed throughout history or are those descriptions socially constructed and historically determined? Are we, gay men and lesbians, born that way (God-given, so to speak), or do we perversely “choose” our gay conduct? (Such a choice, given the discrimination facing gay men and lesbians, would seem highly irrational.) Often, general society appears to determine its attitude towards gay men and lesbians depending on “the” answer. Either answer is simplistic and probably not the whole truth, at least for myself. I suspect that who I am, and who each and every gay person is, results from a complex

³⁶ Remarks at Symposium, *The Bill of Rights Versus The Ballot Box: Constitutional Implications of Anti-Gay Ballot Initiatives* (Mar. 12, 1994) (transcript on file with the *Ohio State Law Journal*).

interaction of genes, environment, and individual choices. The real question is why in a free country does the answer matter? (My life partner, Margaret, has commented that some people are going to be disappointed when they get to Heaven and are accounting to God for their life and God says, "But I didn't care about that!")

While gay men and lesbians have fought to control their societal label, those who would do us harm have developed a whole rhetoric to condemn us and disenfranchise us—in particular, the whole "special rights" label. This misnomer is a disguise for a general attack on all civil rights. Gay men and lesbians, like all other oppressed groups, want only equal treatment under the law; when all Americans are treated equally, men and women, blacks and whites, gays and nongays, civil rights laws will be redundant. Until then, civil rights laws are necessary to guarantee equal treatment for all historically mistreated groups. What the current anti-gay initiatives seek to do is prevent one segment of the American populace from obtaining civil rights laws to guarantee equal treatment.

In many ways, this Symposium is a tribute to the resiliency of gay Americans and the courage of those brave Stonewall pioneers who led the way. In my twenty years of research, litigation, and advocacy, I have seen great progress for my community. I continue to have great hope for the American dream of equality for all. Yet, the current battle over anti-gay initiatives is extremely frightening and disheartening. I truly hope that when the initiative cases reach the Supreme Court that the *Rivera Principle* does not hold. This use of the initiative is the most cynical exploitation of fear for the most mercenary of reasons. Although the gay community currently fights this battle alone, I hope that all Americans will come to see that this battle is for every individual's freedom and every group's freedom. If gay Americans and their supporters do not convince the courts, other Americans will soon wake up to find an America where they are the next group to find that their "civil" rights have become "special" rights.